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No. 99-604

In the Supreme Court of the United States

CARMEN VELAZQUEZ, ET AL., PETITIONERS

v.

LEGAL SERVICES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Congress, through a series of appropriations acts, has placed certain restrictions on the activities of entities that receive federal funds from the Legal Services Corporation (LSC). The question presented is:

Whether the statutory provisions, as implemented by the LSC in regulations that allow LSC fund recipients to create affiliate organizations that may use non-federal funds to engage in the restricted activities, violate the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 164 F.3d 757. The memorandum and order of the district court (Pet. App. 53a-103a) are reported at 985 F. Supp. 323.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1999. A petition for rehearing was denied on July 8, 1999 (Pet. App. 104a-105a). The petition for a writ of certiorari was filed on October 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1974, Congress enacted the Legal Services Corporation Act (the LSC Act), Pub. L. No. 93-355, 88 Stat. 378 (42 U.S.C. 2996, *et seq.*), which created the Legal Services Corporation (LSC) as an independent, non-profit corporation to "provide financial assistance to qualified programs furnishing legal assistance to eligible clients." 42 U.S.C. 2996e(a)(1)(A). The LSC Act authorizes the LSC to make grants to, and to contract with, individuals, organizations and (in certain limited circumstances) state and local governments, for the purpose of providing legal assistance to eligible clients. *Ibid.* The LSC receives funds appropriated annually by Congress to provide such financial assistance. The LSC then distributes those funds to programs, individuals, and other entities that submit applications describing their proposed legal services activities. 42 U.S.C. 2996b(a), 2996e(a).

The LSC Act limits LSC financial support to "legal assistance in noncriminal proceedings or matters" for "persons financially unable to afford legal assistance." 42 U.S.C. 2996b(a). The LSC program was designed to target the "day-to-day" legal problems of the poor. 119 Cong. Rec. 20,688 (1973) (statement of Rep. Biester); see also 142 Cong. Rec. H8189 (daily ed. July 23, 1996) (statement of Rep. Torkildson) (the Act's primary focus is on "bread-and-butter services" to the poor).

Recipients of LSC funds have long been subject to restrictions to ensure the focus on basic legal services. The LSC Act has, from the outset, prohibited LSC fund recipients from, *inter alia*, making available any LSC funds, program personnel, or equipment to any political party, to any political campaign, or for use in "advocating or opposing any ballot measures." 42 U.S.C.

2996e(d)(3) and (4). The LSC Act has also prohibited LSC funds from being used to influence any governmental agency action or legislation, except upon request or when necessary to represent an eligible client. 42 U.S.C. 2996f(a)(5). And the Act has prohibited LSC funds from being used to provide legal assistance with regard to any proceeding relating to any nontherapeutic abortion, elementary or secondary school desegregation, military desertion, or violation of the selective service laws. 42 U.S.C. 2996f(b)(8)-(10). Finally, the LSC Act has, from the outset, prohibited LSC fund recipients from bringing any class action suits directly, or through others, unless express approval is obtained from the LSC fund recipient's project director according to established policies. 42 U.S.C. 2996e(d)(5). The LSC Act restrictions apply to LSC fund recipients' activities funded by LSC funds as well as by other nonpublic and nontribal funds. 42 U.S.C. 2996i(c).

b. In 1996, at a time when proposals were before Congress to eliminate the LSC altogether because of controversy over certain activities pursued by some LSC fund recipients, Congress enacted compromise legislation that expanded the scope of restrictions on the activities of LSC fund recipients. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321-53 (1996 Act). Congress carried forward the restrictions again in the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 502(a), 110 Stat. 3009-59 (1997 Act), and has continued the restrictions in subsequent legislation. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 502, 111 Stat. 2510; Omnibus Consolidated and Emergency

Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 411, 112 Stat. 2681-107.

Under those appropriations acts, LSC fund recipients are precluded from representing certain parties in specified circumstances. LSC fund recipients may not: advocate or oppose any reapportionment of a legislative, judicial, or elective district, or participate in any litigation related thereto; attempt to influence the "issuance, amendment, or revocation of any executive order, regulation" or similar government promulgation; attempt "to influence any part of any adjudicatory proceeding of any Federal, State, or local agency" that is formulating general agency policy; attempt to influence "the passage or defeat of any legislation, constitutional amendment, referendum, initiative * * * of the Congress or a State or local legislative body"; initiate or participate in class-action lawsuits; represent aliens who are unlawfully present in the United States except in cases of domestic violence; conduct a training program "for the purpose of advocating a particular public policy or encouraging a political activity"; claim or collect attorneys' fees; participate "in any litigation with respect to abortion"; "participat[e] in any litigation on behalf of a person incarcerated in a Federal, State, or local prison"; participate in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system," except that representation is allowed of an individual client "seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation"; or defend a person in a proceeding to evict the person from a public housing project if the person has been charged with engaging in illegal drug activity that threatens the health or safety of a tenant or employee

of the housing agency. 1996 Act, § 504(a)(1), (2), (3), (4), (7), (11), (12), (13), (14), (15), (16) and (17), 110 Stat. 1321-53 to 1321-56; 1997 Act, § 502(a)(2)(C), 110 Stat. 3009-60.[1]

The restrictions apply to the use by LSC fund recipients of funds received both from the LSC and from state or local governments or private donors. 1996 Act, § 504(d)(1) and (2), 110 Stat. 1321-56. LSC fund recipients must notify non-federal donors "that the funds may not be expended for any purpose prohibited" by the Act. 1996 Act, § 504(d)(1), 110 Stat. 1321-56.[2]

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[1] The restrictions do not preclude LSC fund recipients from using non-LSC funds "to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body or committee," 1996 Act, § 504(e), 110 Stat. 1321-57, or "for the purposes of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient." 1996 Act, § 504(b), 110 Stat. 1321-56.

[2] The LSC Act has also provided since 1974 that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. 2996(6); see also 42 U.S.C. 2996e(b)(3) (LSC "shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association * * * or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.").

c. Shortly after passage of the 1996 Act, the LSC published regulations implementing the new statutory restrictions. See 61 Fed. Reg. 41,960 (1996); *id.* at 63,749. Coupled with pre-existing guidelines, the regulations applied the new restrictions not only to LSC fund recipients but also to any "interreleated" organization, defined as an organization as to which the LSC fund recipient determined "the direction of management and policies" or influenced them "to the extent an arm's length transaction may not be achieved." See 50 Fed. Reg. 49,279 (1985).[3]

2. a. On January 14, 1997, petitioners, who are lawyers employed by LSC fund recipients, their indigent clients, and various contributors to LSC fund recipients, brought this suit in the United States District Court for the Eastern District of New York against the Legal Services Corporation and Legal Services of New York. Petitioners alleged that the restrictions on the use by LSC fund recipients of federal and non-federal funds violate a variety of federal constitutional provisions.

b. On March 14, 1997, the LSC announced its intention to amend its regulations to allow LSC fund recipients "to have an affiliation or relationship with separate organizations which may engage in prohibited activities funded solely with non-LSC funds," 62 Fed. Reg. 12,102 (1997), in the same manner as was approved for separate projects in *Rust* v. *Sullivan*, 500 U.S. 173 (1991),

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[3] The regulations also applied the restrictions to any entity that received a transfer of funds from an LSC fund recipient. 61 Fed Reg. at 63,752. If the funds transferred to the entity were LSC funds, the restrictions applied to all of the transferee entity's activities; if an LSC fund recipient transferred non-LSC funds, the restrictions applied only to the transferred funds. *Ibid.*

and it issued interim regulations addressing that issue. 62 Fed. Reg. at 12,101 to 12,104. LSC issued final regulations on May 21, 1997. 62 Fed. Reg. at 27,695.

Under the final regulations, an LSC fund recipient may create an affiliate that may spend non-federal funds on activities in which the LSC fund recipient itself may not engage ("restricted activities"), so long as the LSC fund recipient maintains its "objective integrity and independence" from the affiliate. 45 C.F.R. 1610.8(a). An LSC fund recipient "will be found to have objective integrity and independence" from an affiliate if: (1) the affiliated organization is a "legally separate" organization; (2) the affiliate "receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities"; and (3) the LSC fund recipient is "physically and financially separate" from the affiliate. *Id.* § 1610.8(a)(1)-(3). Satisfaction of the third criterion is to be determined on a case-by-case basis according to the "totality of the facts," including, but not limited to: "(i) "[t]he existence of separate personnel; (ii) [t]he existence of separate accounting and timekeeping records; (iii) [t]he degree of separation from facilities in which the restricted activities occur, and the extent of such restricted activities; and (iv) [t]he extent to which signs and other forms of identification which distinguish the [LSC fund] recipient from the [affiliated] organization are present." *Id.* § 1610.8(a)(3)(i)-(iv).[4]

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[4] The new regulations also amended the rule governing the transfer of funds to provide that the restrictions apply only when an LSC recipient transfers LSC funds to another person or entity. When a person or entity receives LSC funds from an LSC fund recipient, that person or entity is subject to the restrictions with respect both to its LSC and its non-LSC funds. 45 C.F.R. 1610.7. However, a person or entity that receives *non*-LSC funds from an

c. On March 14, 1997, the United States intervened in the district court proceedings, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the restrictions.

3. On March 21, 1997, petitioners sought a preliminary injunction against enforcement of the restrictions to the extent they prevent LSC fund recipients from using non-federal funds to engage in certain activities. The district court denied the preliminary injunction, Pet. App. 53a-103a, concluding that petitioners had failed to establish a probability of success on the merits.

The court first held that the LSC's regulations requiring separation between LSC fund recipients and their affiliates are consistent with the statutory funding restrictions. Pet. App. 87a-92a. The court also held that the LSC's program-integrity requirements are appropriately tailored to serve the government's interest in preventing the appearance that the government is endorsing activities that Congress does not wish to fund. *Id.* at 92a-96a.

The district court rejected petitioners' contention that the LSC program integrity requirements, while "embraced by the Court in *Rust* [v. *Sullivan*, 500 U.S. 173 (1991)]" (Pet. App. 92a), are different when applied to lawyer-client relationships. The court rejected petitioners' argument that the affiliate rules accepted in *Rust* do not provide the appropriate benchmark here because, petitioners contend, the LSC regulations "strike at the heart of activities that are laden with First Amendment value." *Id.* at 99a. The court found that, while the lawyer-client relationship implicates First Amendment values, "the restrictions pertaining

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LSC fund recipient is not subject to the restrictions. See 62 Fed. Reg. at 27,696 to 27,697.

to LSC recipients do not significantly impinge on the lawyer-client relationship," especially when contrasted with the "proactive aspects" of Title X of the Public Health Service Act, involved in *Rust*. *Id.* at 101a. In fact, the court noted that the LSC regulations "broadly promote the lawyer-client relationship by providing that the lawyer may counsel the client, refer the client to another attorney, and explain to the client that LSC restrictions preclude the lawyer from engaging in the activity the client may wish to undertake." *Id.* at 102a.[5]

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-52a.

a. The court held that the LSC's regulations are based on a reasonable interpretation of the relevant statutory provisions, Pet. App. 13a-15a, and that the prohibition against furnishing LSC funds to entities that engage in certain activities does not unconstitutionally encroach on the relationship between lawyer and client, *id.* at 15a-18a. The court reasoned that, even assuming "that an 'all-encompassing' lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships funded under Title X, which were considered in *Rust*." *Id.* at 16a-17a.

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[5] The district court rejected petitioners' "rather casual due process and equal protection claims." Pet. App. 102a. The due process claim failed "for the same reasons the analogous claim failed in *Rust*—namely, because plaintiffs are not absolutely precluded from engaging in prohibited activities and, furthermore, have no constitutional entitlement to the benefits provided by the legal services program." *Ibid.* The equal protection argument failed because "the Government had a rational basis for restricting the activities of recipients, and because poverty is not a suspect classification." *Ibid.*

The court also rejected petitioners' facial challenge to the adequacy of the program-integrity rules contained in the regulations which allow LSC fund recipients to establish affiliate organizations that can then use non-federal funds to engage in activities that are foreclosed to the recipients themselves. Pet. App. 18a-24a. The court rejected petitioners' argument (*id.* at 18a) that the restrictions create "unconstitutional conditions" by unreasonably burdening LSC fund recipients' use of non-federal funds to engage in activities protected by the First Amendment. The court noted that petitioners "provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms." *Id.* at 24a. In particular, the court found that the existence of adequate alternative avenues for engaging in restricted activities through affiliates is sufficient to satisfy First Amendment scrutiny. *Id.* at 20a-24a.

The court of appeals next rejected petitioners' claims of viewpoint discrimination with respect to the general restrictions on lobbying and attempting to influence a rulemaking proceeding. Pet. App. 24a-26a. It held that the classifications established by the provisions are "based on subject matter, not viewpoint." *Id.* at 25a. The restrictions do not suppress ideas, the court reasoned, but rather merely prohibit fund recipients from engaging in activities outside the scope of the program. *Id.* at 26a.

The court also upheld the general prohibitions against lobbying, rulemaking, and participating in litigation "involving an effort to reform a Federal or State welfare system," Pet. App. 26a-27a, and the prohibition against "initiat[ing] legal representation . . . involving an effort to reform a . . . welfare system," *id.* at 27a-

28a. The court reasoned that those provisions are viewpoint neutral because they prohibit activity that either supports or opposes welfare reform. *Ibid.*

The court reversed, however, with regard to one aspect of the restrictions related to welfare reform—the provision that creates an exception to those restrictions by permitting representation of a client seeking specific relief from a welfare agency "if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." Pet. App. 29a. The court held that the exception permitting only certain representations of clients seeking relief from a welfare agency constitutes viewpoint discrimination subject to strict First Amendment scrutiny, and the court perceived no reason why that provision survived strict scrutiny. *Id.* at 29a-36a. The court of appeals directed the district court to enter a preliminary injunction barring enforcement of the restriction on seek specific relief. *Id.* at 36a-39a.

b. Judge Jacobs filed a separate opinion, concurring in the majority's rulings upholding most of the statutory provisions, but dissenting from the ruling striking down the one welfare-related provision as unconstitutional viewpoint discrimination. Pet. App. 40a-52a. He specifically pointed to the Ninth Circuit's decision in *Legal Aid Society of Hawaii* v. *Legal Services Corporation*, 145 F.3d 1017, cert. denied, 119 S. Ct. 539 (1998) (White, J., sitting by designation), which rejected similar challenges to the LSC restrictions. Pet. App. 49a.

ARGUMENT

The court of appeals correctly upheld, against a facial challenge under the First Amendment, most of the restrictions on activities by entities that receive Legal Services Corporation (LSC) funds, as well as the

program-integrity regulations that require an LSC fund recipient to establish a separate affiliate that receives non-federal funds to engage in activities that are foreclosed to the recipient itself. Those rulings were based on a straightforward application of this Court's precedents and do not conflict with any decision of any other court of appeals. Review of those issues by this Court therefore is not warranted.[6]

1. a. The Ninth Circuit recently rejected a similar facial challenge to the LSC restrictions, and this Court declined to review that ruling. See *Legal Aid Society of Hawaii* v. *Legal Serv. Corp.*, 145 F.3d 1017 (9th Cir.), cert. denied, 119 S. Ct. 539 (1998) (*LASH*). There is no reason for a different disposition here.

In an opinion by retired Associate Justice White, sitting by designation, the Ninth Circuit in *LASH* held that the challenged restrictions on activities of LSC fund recipients do not violate the First Amendment.

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[6] As noted above (see p. 11, *supra*), the court of appeals held unconstitutional the provisions in the annual appropriation acts that create an exception to the restrictions related to welfare reform; that exception permits representation of a client seeking specific relief from a welfare agency "if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." Pet. App. 29a. The court of appeals concluded that the quoted proviso to the exception constitutes impermissible viewpoint discrimination. On December 6, 1999, we filed a petition for a writ of certiorari seeking this Court's review of that aspect of the decision below. *United States* v. *Velazquez*, No. 99-960. For the reasons stated in our certiorari petition, that holding is erroneous and warrants review by this Court. By contrast, the aspects of the Second Circuit's decision sustaining the LSC program-integrity regulations and the other provisions petitioners challenge here are correct, are supported by this Court's decisions and the Ninth Circuit's decision in *LASH*, and do not warrant review.

Id. at 1024-1029. The court noted that the LSC regulations requiring a "distinction between restricted and unrestricted organizations are nearly identical to the regulations upheld in *Rust* and there is no basis for distinguishing this case from *Rust*." *Id.* at 1024. Thus, the Ninth Circuit explained, "the Court's discussion in *Rust* of why the Secretary's regulations were constitutional control[led] the disposition of [the Ninth Circuit's] case." *Id.* at 1025. As in *Rust*, the Ninth Circuit reasoned, the government is not denying a benefit to anyone on the basis of First Amendment activity, but is "instead simply insisting that public funds be spent for the purposes for which they were authorized." *Ibid.* (quoting *Rust*, 500 U.S. at 196). Moreover, the court continued, LSC recipients are not being required to give up the specified activities, but are merely being required to keep such activities separate from LSC-funded functions by conducting them "through entities that are separate and independent" from the LSC recipient. *Ibid.*

The Ninth Circuit also rejected the contention that *Rosenberger* v. *Rector & Visitors of Univ. of Virginia.*, 515 U.S. 819, 833 (1995), renders the challenged restrictions unconstitutional. It reasoned that, unlike in *Rosenberger*, where the government expended funds to encourage a diversity of views from private speakers, "the LSC program is designed to provide professional services of limited scope to indigent persons, not [to] create a forum for the free expression of ideas." *LASH*, 145 F.3d at 1028. The Ninth Circuit similarly rejected the contention that the restrictions should be evaluated under a compelling-interest standard, pointing out that a recipient voluntarily receives LSC funding and consents to the restrictions, that the recipient remains free to engage in the activities at issue through a separate

entity, and that *Rust* did not apply such a standard. *Id.* at 1028-1029. The Second Circuit's decision in this case, sustaining the program-integrity regulations and the general thrust of the statutory restrictions on LSC fund recipients thus is consistent with the Ninth Circuit's decision in *LASH*.

b. The court of appeals' decision also is fully consistent with this Court's precedents, which confirm the validity of the LSC's program-integrity regulations requiring that restricted activities may be conducted with non-LSC funds only through an independent affiliate. Congress has broad power to specify the purposes for which funds appropriated out of the Federal Treasury may be spent. See U.S. Const. Art. I, § 9, Cl.7. It is well settled that Congress, in exercising that power, may provide that federal funds are not to be used to support particular activities that also are supported by non-federal funds—even if the activities involved are of the sort that are fully protected by the First Amendment when engaged in solely by private parties—so long as the fund recipient is allowed to form an affiliate organization to receive and spend non-federal funds to engage in those activities. See, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 400 (1984). Congress may require that such an affiliate organization be kept "physically and financially separate" from the organization that receives federal funds. *Rust* v. *Sullivan*, 500 U.S. 173, 180, 187-190 (1991).

This Court has, on several occasions, rejected contrary arguments akin to those pressed by petitioners here. In *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), the Court rejected a challenge to Section 501(c)(3) of the Internal Revenue Code, which forbids tax-exempt organizations from engaging in lobbying. The Court held that the restriction on lobbying did

not place an unconstitutional condition on the receipt of a tax benefit, noting that the organization could create a separate affiliate to engage in lobbying activity. *Id.* at 544-545. The Court explained that "[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying. This is not unduly burdensome." *Id.* at 545 n.6.

In *League of Women Voters*, 468 U.S. at 381-402, the Court struck down a statutory provision that prohibited federally subsidized stations from broadcasting editorial opinions, in part because a station "is not able to segregate its activities according to the source of its funding" and has "no way of limiting the use of its federal funds to all noneditorializing activities." *Id.* at 400. The Court recognized, however, that "if Congress were to adopt a revised version of [the statute] that permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." *Ibid.* Under such a statute, a station "would be free, in the same way that the charitable organization in *Taxation with Representation* was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities." *Ibid.*

In *Rust*, the Court sustained regulations implementing Title X of the Public Health Service Act that prohibited the use of federal funds "in programs where abortion is a method of family planning." 500 U.S. at 178. The regulations prohibited Title X projects from, among other things, counseling patients regarding

abortion, referring patients to abortion providers, lobbying for legislation to increase the availability of abortion, and using legal action to make abortion available. See *id.* at 180. The regulations also required that Title X projects be organized so that they were "physically and financially separate" from prohibited abortion-related activities. Under that provision, the federally funded project was required to have "objective integrity and independence" from prohibited activities, beyond mere bookkeeping separation. *Id.* at 180-181. The Court held that the regulations did not violate the First Amendment because, "[b]y requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with [the Court's] teachings in *League of Women Voters* and *Regan* [v. *Taxation with Representation*], not denied it the right to engage in abortion-related activities." *Id.* at 198. Rather, "Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program." *Ibid.*

The LSC restrictions at issue here are fully consistent with *Taxation with Representation*, *League of Women Voters* and *Rust*. The statutory restrictions, as implemented by the LSC in its final regulations, allow LSC fund recipients to create and control affiliates that use non-LSC funds to provide legal services that are foreclosed to the LSC fund recipients themselves. As noted by the courts below, the challenged regulations are substantially the same as those upheld in *Rust*. See Pet. App. 20a (discussing similarities in the two sets of regulations); *id.* at 77a-79a (same). Like the *Rust* regulations, the LSC regulations require "physical and

financial separation" as part of a requirement that the LSC fund recipient and its affiliate maintain "objective integrity and independence." Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9. Sufficient physical and financial separation under the LSC program is determined on a case-by-case basis using the same factors identified in the *Rust* regulations: the existence of "separate personnel," "separate accounting and timekeeping records," "the degree of separation from facilities in which restricted activities occur," and the presence of "forms of identification which distinguish the recipient" from the affiliate. Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9.

Indeed, in some respects, the LSC restrictions are more permissive than those at issue in *Rust*, because the latter contained a rule that prevented physicians from referring a patient to an abortion provider or even mentioning abortion as a method of family planning. See 500 U.S. at 180. The LSC regulations contain no comparable restrictions. LSC fund recipients are free to discuss with their clients other options (including activities in which the LSC recipient may not engage) and to refer clients to organizations that provide restricted services (including any affiliate organization the LSC fund recipient may create under the program-integrity regulations). The one requirement in the LSC regulations that was not in the *Rust* regulations—that an LSC fund recipient and its affiliate organization be "legally" separate entities (45 C.F.R. 1610.8(a)(1))—does not alter the analysis, because such a requirement was held by this Court in *Taxation with Representation* not to constitute an undue burden. 461 U.S. at 544- 545 n.6; see *LASH*, 145 F.3d at 1027-1028.

The LSC regulations thus allow for adequate alternative channels for petitioners to engage in activities

protected by the First Amendment. If an LSC fund recipient avails itself of the affiliate structure, its ability to use non-federal contributions is subject to restrictions only if the donor makes a specific choice to give the money to the LSC fund recipient rather than its non-LSC affiliate, after receiving written notification that that choice would make the contribution subject to the same restrictions as federal funds. That consequence raises no substantial First Amendment issue. The affiliate regulations therefore are constitutional under *Taxation with Representation, League of Women Voters* and *Rust*.

2. a. Petitioners contend (Pet. 17-20) that certiorari is warranted to address the issue whether the LSC restrictions unconstitutionally interfere with the relationship between a government-funded attorney and his or her client. In doing so, petitioners rely primarily upon dicta in *Rust*, in which this Court suggested that "[i]t could be argued * * * that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." *Rust*, 500 U.S. at 200. The *Rust* Court went on to state that it "need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship." *Ibid.*

The *Rust* Court identified two reasons why the regulations did not interfere with the doctor-patient relationship. Both apply with equal force here. First, the *Rust* Court noted that "[nothing in [the regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." *Rust*, 500 U.S. at 200. That is unquestionably the case with respect to lawyers employed by LSC fund recipients.

Second, the *Rust* Court observed that "the doctor-patient relationship established by the Title X program" is not "sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Rust*, 500 U.S. at 200. In those circumstances, the Court found, the "doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her. The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Ibid.* As the court of appeals recognized, "the lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships funded under Title X, which were considered in *Rust*." Pet. App. 17a. As explained above, the LSC program covers "bread and butter" legal services and has been limited from its inception. See, *e.g.*, 42 U.S.C. 2996e, 2996f(b). Simply put, and contrary to petitioners' suggestion (Pet. 21-24), Congress never intended for LSC attorneys to provide comprehensive legal services to their clients; Congress intended for them to furnish the types of legal services that it believed best served the public interest.

Moreover, unlike the doctors in *Rust*, who were subject to a rule that prohibited them from even counseling patients about receiving an abortion elsewhere, attorneys employed by LSC fund recipients remain free to inform their clients that certain litigation or other legal representation is beyond the scope of their representation and to refer any clients to any organization, including any affiliate, that can handle such legal representation. Indeed, unlike in *Rust*, there are no restraints on the advice that may be provided concerning the need for those services and their availability elsewhere.

Because attorneys employed by LSC fund recipients may furnish such advice as an alternative to entering into a full attorney-client relationship with respect to a particular problem confronting a client, the concerns identified by the Court in *Rust* concerning physicians in a counseling relationship do not even directly arise here. As in *Rust*, then, this Court need not determine the extent to which government regulations may interfere with an "all-encompassing" lawyer-client relationship, since the LSC regulations do not create such a relationship.

Petitioners attempt to distinguish *Rust* by arguing (Pet. 19- 20) that the Title X program in *Rust* was designed to convey a governmental message, while the LSC program is designed to encourage private speech in a manner akin to the program at issue in *Rosenberger* v. *Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995). But petitioners' attempted distinction of *Rust* does not hold up. In the first place, the counseling by doctors and other persons employed by family planning organizations that received Title X funds in *Rust* was not government speech. It was private, professional counseling rendered within the parameters of a federally assisted program. The same is true here.

By the same token, the program in *Rosenberger* was very different from the programs in *Rust* and here. It was designed to encourage diverse private expression, and the Court held that the University had, in effect, created a limited public forum for such private expression. 515 U.S. at 829-830; see *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 596 (1998); see also *id.* at 598-599 (Scalia, J., concurring in the judgment) (noting that *Rosenberger* "found the viewpoint discrimination unconstitutional, not because funding of 'private'

speech was involved, but because the government had established a limited public forum").

The LSC program, by contrast, does not create a public forum and is not dedicated to the promotion of diverse private expression in such a forum—it exists to subsidize certain discrete legal services and activities. As the Ninth Circuit correctly held, "the LSC program is designed to provide professional services of limited scope to indigent persons, not [to] create a forum for the free expression of ideas." *LASH*, 145 F.3d at 1028. Any limitations on expression by LSC fund recipients are but an incidental result of the program's restrictions on certain types of activities that the recipient may undertake on behalf of clients. Such an incidental limitation on the use of federal funds is "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in *activities* outside of the project's scope." *Rust*, 500 U.S. at 194 (emphasis added). Cf. *Rosenberger*, 515 U.S. at 833 (recognizing that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes").

Furthermore, in *Rosenberger*, the University of Virginia provided funding to a wide array of student viewpoints, but then singled out religious expression as ineligible for funding. The LSC restrictions do not fund a broad array of private speakers (or lawyers) but then single out a disfavored viewpoint for a funding restriction. Instead, the LSC Act establishes a program that is narrow in scope to begin with, and the annual appropriations acts simply further narrow the scope of that program.

b. Petitioners' arguments with respect to viewpoint discrimination (Pet. 21-24) are without merit even on

their own terms. The restrictions concerning class actions, attorneys' fees, and attempting to influence the formulation of broad policy, which petitioners cite (Pet. 22), are neutral in their terms and do not draw distinctions among the activities of LSC fund recipients on the basis of viewpoint.

The sole basis for petitioners' claim of viewpoint discrimination is the fact that Congress has chosen to fund certain activities and not others. The petitioners in *Rust* made the same argument, and this Court rejected it. The program at issue in *Rust* provided for family planning counseling but expressly prohibited abortion counseling and referral. The petitioners in that case contended that the program discriminated on the basis of viewpoint because it allowed speech discussing some viewpoints (those favoring certain family planning options) while prohibiting competing viewpoints (those favoring abortion as a family planning option). See 500 U.S. at 192. The Court rejected that argument, holding that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.* at 193. The Court concluded: "This is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Id.* at 194.

In addition, the *Rust* Court rejected the rationale that forms the central premise of petitioners' argument in this case. Thus, the Court observed:

> Petitioners' assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.

Rust, 500 U.S. at 194 (citations omitted). The fact that the activity involved is protected by the First Amendment in other settings does not prevent the Government from declining to fund that activity if it is outside the scope of the program. *Id.* at 194-195 ("But we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.").

LSC fund recipients do not occupy a position different in any relevant respect from that of the doctors in *Rust*. Indeed, the doctors subject to the Title X regulations were prohibited from even stating their viewpoint with respect to the subject of abortion. See *Rust*, 500 U.S. at 180. Lawyers employed by LSC fund recipients, by contrast, are free to express their views regarding any legal matter—including matters subject to the LSC restrictions—and to refer persons to other organizations, including any affiliate, that will represent the persons in otherwise prohibited litigation. Congress thus has not sought to "suppress[] a dangerous

idea" or to "singl[e] out a disfavored group on the basis of speech content." See *id.* at 194. Rather, just as in *Rust*, Congress has simply declined to fund certain activities and provided for a degree of separation between an LSC fund recipient and an affiliate to safeguard the integrity of the federal program.

Accordingly, contrary to petitioners' assertion (Pet. 24), there is no occasion in this case to grant review in order to provide guidance as to when restrictions imposed in conjunction with funding government programs constitute impermissible viewpoint discrimination. This case falls within the teachings of *Rust*, and further review is unnecessary.

c. Petitioners also ask (Pet. 24-27) this Court to resolve the question of "when onerous requirements concerning the wasteful physical separation of government subsidized activities from non-government subsidized activities impermissibly burden the right to engage in First Amendment-protected activities with non-governmental funds." Pet. 24. That contention is based on the unsupported assertion that the LSC's physical separation requirement is so onerous that it has "proven virtually impossible to use." Pet. 24. Petitioners chose, however, to bring a *facial* challenge to the LSC restrictions. And, as the court of appeals recognized (Pet. App. 23a-24a), petitioners "present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms." Petitioners' general allegations that compliance with the LSC regulations is burdensome are insufficient to support their facial challenge.

3. Petitioners suggest (Pet. 27-28) that further review is necessary to determine whether the LSC, as a federally chartered nonprofit corporation, is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in the interpretation of the LSC Act that is embodied in its program-integrity regulations. As the LSC points out in its brief in opposition (at 17-18), there is no conflict in the circuits on this issue, since the only other court of appeals that has addressed the issue has held that LSC regulations are entitled to deference under *Chevron*. See *Texas Rural Legal Aid, Inc.* v. *Legal Serv. Corp.*, 940 F.2d 685, 690 (D.C. Cir. 1991).[7]

In addition, petitioners' contention is particularly inappropriate for review in the circumstances of the present case. In attempting to eliminate *Chevron* deference, petitioners seek to reject the LSC's interpretation of the Act as allowing LSC fund recipients to create affiliates to engage in otherwise restricted activities, and to adopt an interpretation of the Act that makes it more burdensome and therefore, in petitioners' view, more constitutionally suspect. However, where two constructions of a statute are possible, it is a court's duty to interpret the statute in a way that avoids the very sort of constitutional doubt that

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[7] The LSC also states in its brief in opposition (at 18 n.13) that petitioners err in claiming that this case may present the Court's only opportunity to address the First Amendment issues raised by Congress's restrictions. The LSC explains that the debarment provision on which petitioners rely allows, but does not require, the LSC to debar a recipient in certain circumstances and that the LSC has "issued rules providing that the debarment provision shall not apply to constitutional challenges to LSC actions." *Id.* at 18 n.13 (citing 61 Fed. Reg. at 64,636, 64,640, 64,643 to 64,644 (1998) (to be codified at 45 C.F.R. 1606.4(b)(5)(iii)).

petitioners' approach seeks to accentuate. See *Edward J. Debartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Accordingly, resolution of the question whether deference is appropriate would make no difference to the outcome of this case. Deference under *Chevron* is appropriate where the statute is ambiguous. *Chevron*, 467 U.S. at 843. Yet if the statute is ambiguous, a court has a duty—even without resorting to *Chevron* deference—to interpret the statute to avoid creating the sort of constitutional infirmity that petitioners insist would be present without the program-integrity regulations. Thus, even if the Court did not apply *Chevron* deference to the LSC's interpretation of the Act it is charged with administering, the LSC's program-integrity regulations are valid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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